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November 12, 2007

Water Quality Permit Coordinator  
Department of Ecology  
Eastern Regional Office  
4601 N. Monroe St.  
Spokane, WA 99205-1295

Re: Washington Department of Ecology proposed NPDES permits (four) for the Spokane River

Dear Permit Coordinator:

Please accept this letter, together with the enclosed memorandum by Chris Butler of the Spokane Tribe of Indians' Department of Natural Resources, as the Tribe's comments on the four NPDES permits proposed for the Spokane River. It is the Tribe's position that Ecology should not issue the proposed NPDES permits until substantial corrections are made to the proposed dissolved oxygen TMDL for the Spokane River consistent with the Tribe's comments thereon. What follows is in large part taken from the Tribe's comments on that TMDL that are simultaneously being submitted. Despite some duplication and overlap, these comments are submitted with the intent that they be accepted and addressed independently from the Tribe's comments on the TMDL.

The Tribe understands that the River is of deep importance to the citizens of eastern Washington, whose leaders have described it as their "gem," and that Ecology has a difficult job in preserving its values to the region. It is also critically important to the Spokane people. Known as the "Path of Life" to the Tribe, the river is revered for providing the Spokane people with both physical and spiritual sustenance. The river's importance to the Tribe has long been recognized by the United States government as demonstrated by the uncommon approach President Rutherford B. Hayes employed in 1881 to establish the Reservation's boundaries.

Using as borders Chamokane Creek to the Reservation's east, the Columbia River to its west, and the Spokane River on the south, President Hayes set the actual boundary at the opposite bank of each waterway, explicitly including the streams within the Reservation. This unique executive action was relied upon by a federal court – in a case in which Ecology was a party – as evidence that a fishery is one of the primary purposes of the Spokane Indian Reservation for which the Tribe holds water rights. *See, United States v. Anderson*, 591 F.Supp. 1, 5 (E.D.Wash. 1982)(recognizing that water quality must be sufficient to support the

Reservation's fishery purpose). And of course, the fishery use reserved nearly a century and a half ago was a cool or cold water fishery, leading the *Anderson* court to hold that "[t]he quantity of water needed to carry out the reserved fishing purposes is related to water temperature." *Id.* Beyond the fishery purpose, the *Anderson* court determined that an additional primary purpose of the Spokane Indian Reservation is agriculture, and that the Tribe holds federally reserved rights sufficient to satisfy its agricultural needs. Thus, the Tribe holds judicially determined rights to waters for fish and for agriculture – rights that include both quantity and quality that must be protected.

In the 1990s, the Tribe was confronted with myriad threats to its Reservation resources and to the health of its people. For decades, uranium mining and milling both on and off the Reservation released hazardous substances into the Reservation's waters. Heavy metals flowing down the Spokane River from Idaho's Silver Valley and down the Columbia River from British Columbia contributed to the threats. In response, Tribal leadership determined to assert its sovereignty pursuant to federal environmental laws, including the Clean Water Act. Tribal representatives endured under that Act an arduous six-year process, ultimately securing for the Tribe "Treatment as a State" status for administering Reservation water quality standards under Section 303(c) and for certification authority under Section 401. And in 2003, following public comment, EPA approved the Reservation's surface water quality standards developed by the Tribe with an eye specifically toward protecting the health of its membership and Reservation resources.

The Spokane Tribe characterized the Spokane River as excellent, and classified it as a Class A water body, as has the State of Washington. Both governments have also designated uses for the river that include salmonid migration, rearing, spawning and harvesting. These uses are consistent with the Tribe's federally reserved fish rights, and are also consistent with the Clean Water Act's stated goal of restoring and maintaining the chemical, physical and biological integrity of the nation's waters and to have water quality that provides for the protection and propagation of fish, shellfish and wildlife and for recreation. A high bar is thus set which, as discussed in the Tribe's TMDL comments, Ecology's proposed TMDL fails to clear.

The September, 2007 *Draft Spokane River and Lake Spokane Dissolved Oxygen Total Maximum Daily Load Water Quality Improvement Report* ("Draft TMDL") cites the fact that the Spokane Tribe's water quality standards are not being met as one of the reasons a TMDL is needed. Draft TMDL at vii, 7, 15. This fact is correct, and for several years has been repeated to Ecology both verbally and in writing by representatives of the Spokane Tribe's Department of Natural Resources. See, Chris Butler TMDL memorandum, attached to the Tribe's TMDL Comments. Unfortunately, the Draft TMDL then offers nothing of substance to indicate that Ecology's efforts will lead to attainment of the Tribe's standards. Yet the proposed NPDES permits assume not only that the TMDL will serve its purposes, but more, the permits' present reliance on the unapproved TMDL improperly assumes it to be in full force and effect. Reliance on the unapproved TMDL for issuance of the NPDES permits is a substantial procedural flaw.

The national goals stated in the federal Clean Water Act are to restore and maintain the chemical, physical and biological integrity of the nation's waters and to have water quality that provides for the protection and propagation of fish, shellfish and wildlife and for recreation. 42 U.S.C. Sec. 1251(a). Given such goals, Congress structured the Act to include a savings clause that allows sovereigns like the Spokane Tribe and the State of Washington to set standards more stringent than federal standards when necessary. 42 U.S.C. Sec. 1370. *See*, Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 54 Fed. Reg. 390098, 39099 (1989)(applying the savings clause of Clean Water Act Section 510 to Indian tribes). The savings clause enables states and tribes to aggressively act toward meeting the nation's goals through stringent standards that will "force the development of technology." *City of Albuquerque v. Browner*, 97 F.3d 415, 422 (10<sup>th</sup> Cir. 1996). The status quo was unacceptable to Congress when enacting the Clean Water Act, and remains so where the nation's goals remain unmet, like on the Spokane Indian Reservation. The NPDES permits improperly perpetuate this status quo.

Through its standards, the Tribe sought to protect its federally reserved rights to a cold water fishery. And through attending numerous meetings and repeatedly submitting comments over the years, the Tribe sought to advise Ecology of problems in attaining the quality needed for its fishery and to engage in meaningful intergovernmental cooperation toward a solution. Unfortunately, as discussed more thoroughly in Chris Butler's TMDL memorandum (attached to the Tribe's TMDL Comments), the TMDL appears destined to fall short of meeting the Tribe's needs despite the Clean Water Act's direction that downstream standards be addressed. *See*, 40 C.F.R. 122.4(d)(standards); 40 C.F.R. 123.44(c)(2)(permits); 40 C.F.R. 131.10(b)(use designations). *See also*, Amendments to the Water Quality Standards Regulations That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64876, 64887 (1991) (NPDES permits). The Draft TMDL contains no analysis directed at the Tribe's impaired waters, nor any suggestion of how those waters might in the future be improved. In establishing a TMDL, the load shall include a margin of safety that accounts for any lack of knowledge about the interplay of effluents to water quality and protection of propagation of species. 33 U.S.C. Secs. 1313(d)(1)(B) and C). Because Ecology has failed to consider such relevant factors, analytical gaps exist and this requirement has thus not been met. And as noted above, reliance on an unapproved and technically deficient analysis as a basis for the NPDES permits is improper.

The Tribe's water quality is impaired today, and if the TMDL proves a failure, the likelihood of improvement may well be diminished by the procedural and legal inertia the TMDL establishes. Indeed, this effect is already apparent given the draft NPDES permits rely on the TMDL as if it is already approved. Moreover, as noted earlier, one of the primary purposes of the Spokane Indian Reservation is agriculture. With the load allocations set upstream, little room for the Tribe to exercise its rights – rights that are federally-protected and which pre-date virtually all on the Spokane River system. This impact on the Tribe's Reservation will be compounded by issuance of the NPDES permits. Tribal representatives throughout the process have heard upstream interests complain that their ability to engage in economic pursuits will be hampered by enforcement of applicable standards. The social and economic impacts, it is said, will be tremendous. But the consequence of moving forward under a failed approach – both

TMDL and NPDES – is exponentially greater for the Spokane Tribe, whose ability to exercise its agriculture right already is stunted, and its cold water fishery is in jeopardy. In this regard, the social and economic impacts to the Tribe associated with the potential for failure of the TMDL and NPDES permits in meeting applicable standards have improperly not been addressed by the State.

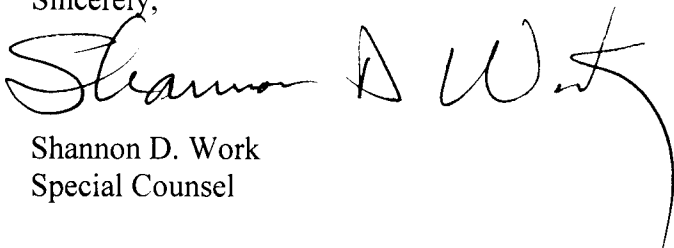
Two additional problems exist with the TMDL's approach that Ecology should address, both of which are discussed in Chris Butler's memo on TMDLs, and both of which implicate the propriety of the NPDES permits as presently proposed. First, Ecology's approach of setting TMDLs separately for branches of a stream, and even segments within the same stream, not only defies logic as Mr. Butler points out, but confounds the Clean Water Act's intent of ensuring that downstream standards are appropriately addressed, and is, therefore, improper. Second, given that the reach of the Spokane River that lies within the Reservation is impaired, the point of compliance for the TMDL should be located there, rather than upstream. A nearby example of this approach is Long Lake, which serves as the point of compliance for TMDLs in Idaho's Silver Valley.

Related to the previous issue is another, specific to the NPDES permits. All of the recently developed permits (including EPA's upstream permits in Idaho) are attempting to predict an affect on the deep waters of Long Lake (thought to be the most critical location), when the target of modeling should be downstream on the Spokane Arm of Lake Roosevelt, where the dissolved oxygen drops to critically low levels. And finally, the Tribe notes that to the extent any of the new permits, such as Liberty Lakes', represent new sources or dischargers under the Clean Water Act regulations, the permits cannot be issued because they will "cause or contribute to the violation of water quality standards" promulgated by the Spokane Tribe of Indians. 40 C.F.R. 122.4.

As noted above, the attached memorandum prepared by Chris Butler of the Tribe's Natural Resources Department raises additional technical and procedural issues, and provides recommendations that are now directed to Ecology by virtue of this submittal. Those comments support this letter and the Tribe's view that, consistent with its comments, Ecology should not issue the NPDES permits until it first finalizes the TMDL, and even then, only after filling numerous analytical gaps and revisiting various important parts of its analysis discussed in the Tribe's TMDL Comments.

The Tribe appreciates this opportunity to submit comments, and hopes they will be given due consideration. Please advise my office of all further activities pertaining to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon D. Work". The signature is fluid and cursive, with a long, sweeping underline that extends from the end of the name down towards the distribution list.

Shannon D. Work  
Special Counsel

cc: Rudy Peone, Director, Natural Resources Department, Spokane Tribe of Indians  
Brian Crossley, Program Manager, Water and Fish Program, Spokane Tribe of Indians  
Chris Butler, Biologist, Water and Fish Program, Spokane Tribe of Indians  
Mike Gearheard, Director, Office of Water, Region 10, U.S. EPA